Supreme Court, U. S.
FILED
NOV 20 1975
JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

Nos. 74-1589 and 74-1590

GENERAL ELECTRIC COMPANY,

Petitioner,

vs.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL.,

Respondents.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL.,

Petitioners,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF LIBERTY MUTUAL INSURANCE COMPANY.

KALVIN M. GROVE,
LAWRENCE M. COHEN,
JEFFREY S. GOLDMAN,
LEDERER, FOX AND GROVE,
Sears Tower—Suite 7916,
233 South Wacker Drive,
Chicago, Illinois 60606,
ROBERT A. PENNEY,
175 Berkeley Street,
Boston, Massachusetts 02226,
CLEM R. KYLE,
717 Liberty Avenue,
Pittsburgh, Pennsylvania 15222,
Attorneys for Liberty Mutual Insurance Company.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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BRIEF AMICUS CURIAE ON BEHALF OF LIBERTY MUTUAL INSURANCE COMPANY.

INTEREST OF THE AMICUS CURIAE.[1]

Liberty Mutual Insurance Company (hereafter "Liberty Mutual") is the petitioner in a case now pending before this

1. This brief is filed with the consent of all parties in accordance with Rule 42(2) of this Court.

Court, *Liberty Mutual Insurance Company* v. *Sandra Wetzel and Mari Ross et al.*, No. 74-1245, which is inextricably linked to the instant case.[2] As the parties here have represented to this Court, "the same question" is presented in both cases.[3] Each controversy centers on the evidentiary elements necessary to prove a *prima facie* case of unlawful discrimination under Title VII in the structure or implementation of an employer's employee disability income insurance program. It is Liberty Mutual's position, as articulated in its principal brief in No. 74-1245 already filed with this Court, that a plaintiff, absent (1) a demonstration that the exclusion of a particular risk, such as pregnancy, or any series of risks from an insurance program is "pretextual" in nature, or (2) that the overall impact of the exclusion or exclusions in the program is to exclude a protected group, *e.g.*, females, from their proportionate share of the benefits distributed, has failed to establish a requisite *prima facie* case of discrimination. The plaintiffs in both *Liberty* and the instant case have failed to meet this burden.

OPINIONS BELOW.

The opinion of the District Court was entered on April 13, 1974, and is reported at 375 F. Supp. 367. Earlier District Court opinions with respect to procedural aspects of the case are reported at 347 F. Supp. 1058 (1972), at 59 F. R. D. 267 (1973), and at 59 F. R. D. 273 (1973). On June 27, 1975, after an initial determination to defer decision until this Court resolved *Liberty* (J. Pet., p. 2), the United States Court of

2. This Court granted Liberty's petition on May 27, 1975. The parties' principal briefs, as well as numerous briefs *amicus curiae* supporting both parties, were filed with this Court before the present Term commenced. No date has yet been set for oral argument.

3. Joint Petition of All Parties for a Writ of Certiorari (hereinafter "J. Pet."), p. 7. Due to this identity of issues Liberty Mutual joins in the request of the parties here that the oral arguments in *Liberty* and *General Electric* be set in tandem.

Appeals for the Fourth Circuit issued an opinion and judgment, printed in the Supplemental Brief of All Parties to Joint Petition for a Writ of Certiorari (hereafter "Supp. br.") at App. F, pp. 1a-14a and App. G, pp. 15a-16a, which in a divided decision (Chief Judge Haynsworth and Judge Russell; Judge Widener dissenting) affirmed the District Court's decision.

STATUTE INVOLVED.

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e(a)(1) (hereafter "the Act"), in pertinent part provides:

> It shall be an unlawful employment practice for an employer—to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . **sex** . . .

QUESTION PRESENTED.

Whether a disability income protection plan which excludes disabilities due to pregnancy, while providing for equal risk coverage, benefits and contributions on behalf of all employees, is prohibited by the Act.

STATEMENT OF THE CASE.

As an *amicus*, Liberty Mutual will not attempt to recapitulate the factual record in the instant case. Certain similarities and differences with *Liberty*, however, should be noted:

1. Both the policies here and in *Liberty* cover numerous disabilities which are limited exclusively to females, *e.g.*, hysterectomies, or to males, *e.g.*, vasectomies, as well as a vast majority which affect both males and females in varying proportions.

2. The policy of General Electric here was virtually comprehensive, covering " 'all disability, including cosmetic surgery [hair transplant], disabilities arising from attempted suicides, etc.' except those occurring during childbirth." *Gilbert* v. *General Electric Company* (Supp. br. at App. F, p. 7a). All such coverage, however, is available to both men and women.[4]
3. Under both the Liberty Mutual and General Electric policies, the same formula, dependent on salary only, determines the amounts to be paid to both men and women. In *Liberty*, moreover, the insurance premium is also identical for each employee: one percent of the employee's salary without regard to the employee's gender.
4. The District Court in the present case, as in *Liberty*, held that actuarial evidence of actual equality of insurance coverage or as to the increased cost of providing pregnancy coverages is irrelevant:

> If it be viewed as a greater economic benefit to women, then this is a simple recognition of women's biologically more burdensome place in the scheme of human existence. An industrial policy which does not account for this fails in providing such sexual equality as is within its power to produce. If Title VII intends to sexually equalize employment opportunity, there must be this one exception to the cost differential defense. 375 F. Supp. at 383.

The Fourth Circuit affirmed this holding, stating that:

> '[W]omen, to be treated without discrimination [under the Act], must be permitted to be women,' . . . Supp. br. at App. F, p. 4a,

4. In *Liberty*, the disability income plan is not so comprehensive, does not cover either of the aforementioned examples, is limited to disabilities which affect the capacity to work, and contains exclusions, which although less common than pregnancy, predominantly affect males.

and over the dissent of Judge Widener, distinguished, as did the Court of Appeals in *Liberty*, this Court's decision in *Geduldig* v. *Aiello*, 417 U. S. 484 (1974). Judge Widener responded (Supp. br. at App. F, p. 12a):

> The court, in Geduldig, held that the exclusion of pregnancy from a state disability insurance plan for employees of private employers was not a classification that would support a finding of sex discrimination, since it was not shown that distinctions involving pregnancy were mere pretexts designed to effect an invidious discrimination against one sex. 417 U. S. at 496-97, n. 20. Such a showing was not made here.

ARGUMENT.

As in *Liberty*, in the instant case this court must construct a Title VII definitional framework against which the income insurance programs of private and public employers will be measured. In previous decisions this Court has provided for the allocation of proof in actions challenging the hiring and testing policies of employers. See *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), and *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). This Court has further determined, *Geduldig* v. *Aiello*, 417 U. S. 484 (1974), the requisite elements of proof to challenge the distribution of income insurance benefits by a state to private employees. Liberty Mutual submits that in *Geduldig* this Court also resolved the threshold question herein, that a pregnancy exclusion in a disability income plan does not constitute *per se* discrimination based on gender, and that what now remains for decision, therefore, is the proper application of *Griggs* to the instant dispute.[5]

5. In *Griggs* and *McDonnell Douglas*, the Court expressly defined the requisite elements of proof for a *prima facie* case by a Title VII plaintiff, in two very specific situations. In *McDonnell-Douglas*, the Court expressly noted the limited application of the framework set forth there to private, non-class-action cases involv-

1. *The courts below failed to properly allocate the burden of proof.* If an employer failed to similarly insure males and females against the same risk, there would be a *prima facie* case of discrimination, shifting the burden of proof to the employer.[6] Such a case would be closely analogous to *McDonnell Douglas*. Here, however, the situation is, as it was in *Geduldig*, markedly different, and, accordingly, so must the requisite allocation of proof. In *Geduldig* this Court recognized "the lack of identity between the excluded disability [pregnancy] and gender as such . . .", 417 U. S. at 496-497 n. 20. Notwithstanding, therefore, whether pregnancy is included or excluded from the covered risks under an insurance program, there is:

> . . . no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not. 417 U. S. at 496-497 (footnote omitted).

In such circumstances, without more, no basis exists for a claim that there is a discriminatory employment practice. Stated differently where, as here, both men and women are protected from the same risks, and the challenge is, as it was in *Geduldig* (*id.* at 494), to the "underinclusiveness of the set of risks" for which protection is offered, a plaintiff can not rely, as was

ing challenges to allegedly restricted employment opportunities. See 411 U. S. at 800 and at 802 n. 13. In *Griggs*, the Court barred the use of apparently "neutral" practices used to "freeze" the effect of prior discriminatory practices and erect "barriers" to employment opportunities where those practices were shown to have a disparate impact on the allocation of jobs between racial groups. By its nature, *Griggs* involved the analysis of aggregate group employment statistics, *i.e.*, the numbers of jobs filled by various racial groups. In an insurance coverage context, to apply *Griggs*, Liberty submits that a plaintiff must demonstrate a disproportionate distribution of the plan's overall benefits, rather than to merely point to specific differences in coverage. No such showing has been made in either the present case or in *Liberty*.

6. For example, a hospitalization policy which covered the medical costs of pregnancy incurred by the wives of male employees but did not cover such costs for female employees would be prohibited.

done in this case, solely on establishing that an insurance exclusion impacts on men and women unequally. Otherwise the exclusion of almost every risk, excepting only those that affect men and women identically, would be prohibited *per se*.

The burden must be on the plaintiff attacking a particular exclusion to demonstrate that the exclusion is "invidious" in either effect or intent, *i.e.*, "pretextual" *Id.* at 496-497 n. 20. For example, a plaintiff could demonstrate that the exclusion has been selected so that one gender materially subsidizes the other, *e.g.*, that the employer pays higher amounts to, or on behalf of, each male employee than is paid for each female employee. Similarly, the benefits granted could be shown to disproportionately advantage males. In such instances the plaintiff would have met the *Griggs* burden, and the employer would have to show a business necessity to justify the disparity or some other "rational relationship" to explain the variance. *Jefferson* v. *Hackney*, 406 U. S. 535, 549 n. 19 (1972). In this case, however, there has been no showing that General Electric had inequitable premiums or benefits or that its pregnancy exclusion was otherwise "pretextual." The plaintiffs, like the *Liberty* plaintiffs, did not meet their initial burden of proof, and *Griggs* is inapplicable.

2. *The evidence submitted by the parties below not only fails to sustain the plaintiffs' burden, but negates the plaintiffs' contentions.* General Electric came forward, although, as shown above, it was not required to, and submitted actuarial evidence as to both its own experience and general macrocosmic evidence, to demonstrate the absence of disparate plan benefits. The parties stipulated, for instance, that the average cost per insured General Electric employee in terms of total benefits paid was (J. Pet., pp. 20a-21a):

	Male	Female
1970	$45.76	$ 82.57
1971	$62.08	$112.91

Actuarial testimony also estimated the female cost differential to be 170% more than the cost for male employees, and projected that this differential would rise to 330% if maternity coverage was included. J. Pet., pp. 21a-22a. There is substantial evidence to corroborate these cost figures. Indeed, a *critic* of the insurance industry concluded that "the loss experience of women, even with pregnancy costs excluded, may run *two and a half times higher* than costs for men."[7] The experience of Liberty *amici* American Telephone and Telegraph Company,[8] the American Life Insurance Association, the Health Insurance Association of America, the American Mutual Insurance Alliance, the National Association of Independent Insurers, and the American Insurance Association bear out these conclusions,[9] as does the actual experience in Hawaii and Rhode Island which further demonstrates the inequality that will be borne by males if an employer must provide pregnancy disability coverage.[10]

7. Herbert C. Dennenberg, former Commissioner of Insurance for the State of Pennsylvania, in testimony before the Joint Economic Committee of Congress on the "Economic Problems of Women", 93 Cong., 1st Sess., Report of Proceedings, Vol. 3 (1973), at 198 (emphasis added).

8. Brief of American Telephone and Telegraph Company as Amicus Curiae on Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit in *Liberty*, pp. 5-6.

9. Brief Amicus Curiae of American Life Insurance Association and Health Insurance Association of America in *Liberty*, p. 26, and Brief Amicus Curiae on Behalf of American Mutual Insurance Alliance, National Association of Independent Insurers, and American Insurance Association on Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit in *Liberty*, p. 5.

10. Coverage of pregnancy under the Hawaii disability plan resulted in an increase in female disability premiums from $4.00 a month to $8.76 a month. Reply Brief of Appellant in *Geduldig*, pp. 17-18. Rhode Island initially included payments for pregnancy related work absences in its program but in 1946 placed limits thereon after it had incurred a deficit of $1.5 million between 1944 when the plan began and mid-1946. Brief of Appellant in *Geduldig*, p. 11. Even thereafter, in 1949-1950, Rhode Island still paid out 30.4% of its total benefits for pregnancy related disabilities. Comment, *Geduldig* v. *Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Col. L. Rev. 441 at 480 n. 202 (1975).

Manifestly in this case, as in *Geduldig*, "[t]he fiscal and actuarial benefits of the program thus accrue to [all] members of both sexes.", a pregnant woman receives ". . . insurance protection equivalent to that provided all other . . . employees, . . ." 417 U. S. at 496-497 n. 20 and at 497. If pregnancy is also covered, as the State of California observed in *Geduldig*, the result would be that,

> . . . 36% of all benefits will be devoted exclusively to benefits for normal pregnancy, and concentrated in the hands of approximately 5% of female workers who are pregnant each year. Since normal pregnancy constitutes by far the largest single category of disability benefits, it would result in a truly dramatic benefit advantage for female workers.[11]

The Act, however, seeks only to insure equality of employment opportunity, not to provide a compensatory advantage for either men or women.[12] To construe *Griggs* to find an exclusion unlawful in such circumstances would require that there must be "a greater economic benefit" provided whenever there are biological differences. *Griggs*, it is submitted, does not require such preferential treatment.

11. Brief of Appellant in *Geduldig*, pp. 35-36.

12. The challenge that must be met by plaintiffs if their technique of simply focusing on the effect of the exclusion, rather than the whole plan, is to be considered at all, is that they provide a tool or test which the courts can rationally use to examine the multitude of private insurance programs. An employer, for example, who provided disability protection against only cancer would presumably be immune from attack because, in contrast to the decision below, "[it would not] grant disability benefits generally, . . ." (Supp. br. at App. F, p. 4a); an employer, however, who covered many temporary disabilities but excludes pregnancy would if the decision below is affirmed, be in violation of the Act. Absent a demonstration of gender inequality with respect to plan contributions, aggregate risk coverage or actual distribution of benefits, however, there is no logical difference. Either both companies have complied with the intent of Title VII or both "had the purpose or effect of discriminating against [females]." *Espinoza* v. *Farah Manufacturing Company*, 414 U. S. 86, 92 (1973).

CONCLUSION.

For the reasons set forth above and in Liberty Mutual's brief in No. 74-1245, as well as those presented by General Electric, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

KALVIN M. GROVE,
LAWRENCE M. COHEN,
JEFFREY S. GOLDMAN,
LEDERER, FOX AND GROVE,
Sears Tower—Suite 7916,
233 South Wacker Drive,
Chicago, Illinois 60606,
ROBERT A. PENNEY,
175 Berkeley Street,
Boston, Massachusetts 02226,
CLEM R. KYLE,
717 Liberty Avenue,
Pittsburgh, Pennsylvania 15222,
Attorneys for Liberty Mutual Insurance Company.